EMPLOYMENT TRIBUNALS (SCOTLAND)

Case Number: 4101407/2020 (V) and 4101408/2020(V)

Hearing held remotely on 16 February 2021 (reading day), 17 and 18 February 2021 (video hearing) and 19 February 2021 (in chambers).

Employment Judge M Whitcombe

Mr Alan Neil	**Claimant** **Represented by:** **Mr G Bathgate (Solicitor)**
Greater Glasgow Health Board	**Respondent** **Represented by:** **Mr C Reeve (Solicitor)**

JUDGMENT

The claim for unlawful deductions from wages is not well-founded and it is therefore dismissed.

REASONS

Introduction

1. The claimant has been employed by the respondent as a radiographer since 16 July 2001 and he continues in the role of Specialist Radiographer at the Glasgow Royal Infirmary ("GRI"). This is his claim for unlawful deductions from wages totalling £25,792.32.

2. The alleged shortfall in the wages properly payable to him concerns payments when rostered for work between 0000 and 0900. The claimant says that since the date of implementation of NHS Circular PCS(AFC)2012/4 he should have received both a "Standby Availability Allowance" and "Organisational Change Payment Protection" in relation to hours rostered and worked between 0000 and 0900.

3. The respondent's position is that the claimant has been paid all of the sums properly payable to him given the eligibility criteria within the circular. Both sides now agree that the claim for arrears is limited by the Deductions from Wages (Limitation) Regulations 2014 to the period from April 2018 to March 2020.

4. The wages properly payable to the claimant when rostered to work between 0000 and 0900 depends on the interplay between several sources of individual contractual terms, including the claimant's contract of employment, national and local collective agreements, NHS Circulars and other documents.

5. Helpfully, the representatives had agreed a list of the legal issues arising and a statement of agreed facts. They had also provided written skeleton arguments. I pre-read those documents, the witness statements and certain other parts of the joint file of evidence on an allocated reading day.

Issues

6. The agreed list of issues was as follows.

1. *What were the Claimant's relevant contractual terms and conditions from 2002 until the implementation in 2014 of NHS Circular PCS(AFC)2012/4 (the Circular)?*

2. *In particular:*

    a. *Was the Claimant working an on-call arrangement or a shift arrangement from midnight to 0900hrs?*

    b. *Were the hours between midnight and 0900hrs part of the Claimant's standard working hours under the General Whitley Council and Agenda for Change?*

3. *At the point of implementation of Circular PCS(AFC)2012/4 was the Claimant's work between midnight and 0900hrs on-call work as defined by paragraph 4 of the Circular?*

        a. *If it was, did the Respondent apply the terms of the Circular appropriately to the Claimant?*

        b. *If it was not, did the Respondent apply the terms of the Circular appropriately to the Claimant?*

4. *Did the Respondent alter the Claimant's system of work on implementation of the Circular?*

5. *If so, did the change to the Claimant's system of work meet the definition of organisational change as set out in the Respondent's Workforce Change Policy and Procedure?*

6. *Has the Claimant shown a legal entitlement to the sums that he is claiming by way of unlawful deduction from wages?*

7. *Is the remedy restricted back to 10 March 2018 under the Deduction from Wages (Limitation) Regulations 2014?*

Evidence

7. I heard evidence from the following witnesses, all of whom gave evidence on oath, verifying their written witness statements (and sometimes answering supplementary questions in chief) before being cross-examined.

8. For the claimant:

a. The claimant himself;
b. Jennifer Gilchrist, radiographer, formerly employed by the respondent between August 2008 and June 2018 and a representative of the Society of Radiographers involved in the negotiation of a relevant local collective agreement in 2002;
c. Kirsty Shiells, radiographer, formerly employed by the respondent between June 2007 and May 2018 and a representative of the Society of Radiographers between 2008 and 2014.

9. For the respondent:

a. Christopher Gaston, Human Resource Manager, Diagnostics Directorate;
b. Bernie Mooney, Site Superintendent Radiographer, Southwest Sector, Diagnostics (and equivalent roles) since 2000, based at the GRI from 2011 to 2015
c. Neil Russell, Head of Payroll Services for the Respondent and also a number of other smaller Health Boards, with 19 years' involvement within NHS Payroll.

10. The joint file of documents ran to 336 pages once two additional packs had been incorporated.

Findings of fact

11. Many of the most important facts were either agreed or certainly undisputed. Many of those were set out in the joint statement of agreed facts. Where there was a dispute I made my findings on the balance of probabilities. The burden of establishing a fact rests with the party asserting that it is true. Ultimately, it is for the claimant to establish that he has been paid less than was "properly payable" to him for the purposes of section 13(3) of the Employment Rights Act 1996.

12. The respondent is a NHS Health Board. The claimant has been employed by the respondent from 16 July 2001 as a radiographer at the Glasgow Royal Infirmary. His written contract of employment dated 26 July 2001 provided under "General Terms and Conditions" that conditions of service would "be those contained in the General Whitley Council and the appropriate Whitley Council". Terms and conditions were also governed and potentially changed by collective agreements between the respondent (and its predecessor organisation) and the relevant staff organisations. Such agreements might also be amended from time to time. The written contract of employment dated 22 November 2002 was identically worded in those respects. The working week consisted of 35 hours and at the employer's discretion the claimant might be required to work additional hours or the pattern of the working week might be varied to meet the needs of the service. In such cases there would be prior consultation with the claimant.

13. Until October 2004, the claimant's terms and conditions were accordingly subject to national NHS Whitley Council Terms and Conditions of Employment. Whitley Council allowed for local agreements to be reached in relation to specific working arrangements and pay enhancements. The

following agreement is an example of that.

The 2002 Agreement

14. The radiographers at Glasgow Royal Infirmary, including the Claimant, entered into an agreement with the respondent on 2 July 2002. The radiographers were represented by the Society of Radiographers who formally accepted the terms of the agreement on their behalf. The written agreement itself is fairly brief and additional evidence of its terms exists in the form of an email from Senga Rowan, then the Superintendent 1 Radiographer, Department of Radiology, Glasgow Royal Infirmary, dated 7 September 2009. She said, "*The standby and "on call" shifts from 12 midnight to 9am were drawn together and it was agreed 3 Radiographers would work from 12 midnight – 9am for a fixed payment of 9 calls and this shift would be included as 7 hrs towards their working week. It was also agreed that there would be no standby/ "on call" allowances paid. We refer to it locally as a "standby shift"* ".

15. I prefer that evidence to the evidence of Jennifer Gilchrist. Her evidence of pre-contractual negotiations is inadmissible. I prefer Senga Rowan's evidence of the terms of the agreement because it was captured in 2009, more than 11 years prior to this hearing and before any dispute arose. Ms Gilchrist's evidence of the terms is not supported by any notes made while the 2002 agreement was in force.

16. On the basis of those sources I find that the terms of the agreement included that, as from 1 August 2002 onwards, three radiographers would be in the hospital on a nightly basis between 0000 and 0900. It was agreed that the staff would be paid an "on-call payment" of 9 calls for the period 0000 to 0900. Christmas and New Year bank holiday rates would be negotiated separately and locally, but that is not relevant for the purposes of the present claim.

17. When rostered to work between 0000 and 0900 radiographers would remain at the hospital and did not carry out "on call" duties from home, coming into

the hospital as and when required. Instead, they would be at the hospital throughout the period 0000 to 0900 whether it was a busy night or a quiet one.

18. Payment for 9 calls was a figure negotiated and agreed by the collective parties. It did not vary in accordance with the workload on any particular night, which could well involve more or fewer calls than that. On call payments were a flat rate per call and were not based on time spent or an hourly rate. Since the deemed number of calls was also fixed, there was effectively a fixed rate per night for rostered work between 0000 and 0900.

19. No payments of "standby allowance" were made to the claimant once the 2002 agreement came into force. That would normally be a hallmark of on-call work. Over a 17 week reference period the claimant, in common with other radiographers, would work no more than 35 hours (initially, pre-Agenda for Change) or 37.5 hours (subsequently, under Agenda for Change) per week on average.

20. Although the working period between 0000 and 0900 was obviously 9 hours long, the 2002 Agreement meant that it was counted as 7 hours of work.

21. The claimant and his witnesses alleged that immediately following a period of work between 0000 and 0900 they received a period of "compensatory rest" which counted towards their normal average weekly working hours. I am sure that it was indeed "compensatory rest" for the purposes of the Working Time Regulations 1998 but that is not the point for present purposes, the point is whether daytime rest the following day counted towards the average weekly working hours. I prefer the respondent's evidence that it did not. It was simply a daytime period during which radiographers were not rostered to work and therefore able to rest. It was not part of the working week in the sense of counting towards total working hours. Radiographers worked a pattern of 5 days over 7 and this was simply part of that pattern. Given that there *is* evidence that the 0000 to 0900 periods *did* count towards the working week (see Senga Rowan's email) there is simply no room for the compensatory

rest also to count towards the total without greatly exceeding the 35 hour average working week then in operation.

22. I do not ignore page 80 of the bundle which refers to an "interim agreement" for "paid compensatory rest". However, that agreement only applied to the period between 6 February 2001 to 6 March 2001 and there is no evidence that it was ever extended. Importantly, that pre-dates the 2002 Agreement. Further, it refers to a different period of rest, from 1pm on the day after a call-out. It dealt with a very different working arrangement, one which was of fixed duration and one which was in any event superseded by the 2002 Agreement. The claimant appears to accept that in paragraph 10 of his witness statement. This document does not help to answer the question what the 2002 Agreement meant.

23. I accept the evidence of the claimant and his witnesses that a bedroom and bed were available to radiographers working between 0000 to 0900, and that they could be used for rest if and when the demands of the service required fewer than all three of the radiographers rostered. I find it inconceivable that three witnesses would lie or be mistaken about that. The explanation for Mr Mooney's very different evidence for the respondent is that it simply did not come to his attention. He worked 0900 to 1700 Monday to Friday and had no personal experience of work between 0000 and 0900 at the Glasgow Royal Infirmary during the relevant period.

24. However, the claimant has not persuaded me that management expressly or impliedly *agreed* that a bedroom would be provided for the use of radiographers. I find on the balance of probabilities that it was something that radiographers did without any express or implied agreement with the respondent. There is no written evidence of any *express* agreement to that effect. The claimant has not argued that any such term was *implied* by custom and practice, nor has the sort of evidence been given which would be necessary to establish that such a term was "reasonable, certain and notorious" (***Bond v CAV Ltd*** [1983] IRLR 360) or followed "because there is a sense of legal obligation to do so" (***Solectron Scotland Ltd v Roper*** [2004]

IRLR 40).

25. After midnight the doors to the department were locked and anyone wishing to enter would have to ring a bell. However, I find that this was an aspect of hospital security rather than an indicator of the type of work being done. Similarly, although pagers were used to alert radiographers to incoming patients that was true during the daytime shifts too and it indicates nothing of significance for present purposes. The type of work done between 0000 and 0900 was driven by clinical need, but clinicians were far less likely to make non-urgent referrals during those hours. Subject to that, referrals would come from the wards as well as from A&E. I am not persuaded that it was of a wholly different character to the work done by radiographers during the day.

Agenda for Change and its implementation

26. In October 2004, the Claimant's terms and conditions of employment became subject to the national NHS Agenda for Change Terms and Conditions of Service Handbook, a national collective agreement. As is well-known, Agenda for Change was the new grading and pay system for NHS staff except doctors, dentists, apprentices and some senior managers. It seeks to harmonise pay scales across traditionally separate pay groups and replaces the Whitley Council system of industrial relations. At its heart lies the concept of partnership between trade union and employer representatives to ensure that the pay system supports NHS service modernisation and meets the reasonable aspirations of staff. See sections 1.4 and 1.5, which I will not set out in full. Section 19.1 states that "*Other terms and conditions, not covered in this handbook, will be determined locally following consultation with staff representatives, with a view to reaching agreement on such terms and conditions or any changes to them*".

27. The standard hours of all full-time NHS staff covered by Agenda for Change are 37½ hours per week. These standard hours may be worked over any reference period, for example 150 hours over 4 weeks or annualised hours, with due regard for compliance with employment legislation such as the

Working Time Regulations 1998. Agenda for Change allowed staff either to retain their locally agreed Whitley Council agreements or to move onto temporary transitional Agenda for Change pay enhancements. This arrangement was due to remain in place until 31 March 2011 when it was intended that nationally agreed terms would be implemented in place of any previous local agreements. In fact, implementation for radiographers came rather later than originally envisaged.

28. The claimant elected to remain on his existing Whitley Council arrangements (including the 2002 agreement) rather than move onto Agenda for Change interim arrangements. Consequently, NHS Circular PCS(AFC) 2008/6 and its addendum dated 12 January 2009 were not applied to him.

29. On 5 August 2009, the Scottish Government published a Circular entitled PCS(AFC) 2009/6. This followed on from NHS Circular PCS(AFC) 2008/6 and its Addendum and provided clarification on the issue of on-call pay rates. It introduced a new payment system for NHS staff who were in receipt of on-call payments, and it specifically changed the call rate amount so that it equated to Agenda for Change rates as opposed to Whitley Council rates. However, once again, staff could elect to remain on their other Whitley Council arrangements if they wished. Only the rate of pay would change.

30. On 14 January 2011, Scottish Government Circular PCS(AFC) 2011/2 put in place a framework to deal with the transition to harmonise arrangements for on-call working and on-call payments across Scotland, stating that staff were able to retain beyond 31 March 2011, on a protected basis, the arrangements they were on before the introduction of the new system, pending agreement on harmonised arrangements. The intention was to negotiate future on-call arrangements on a Scotland wide basis. A working group under the auspices of the Scottish Terms and Conditions Committee ("STAC") was set up to do this.

31. On 11 October 2012, the Scottish Government issued NHS Circular PCS(AFC) 2012/4, generally known as "the On-Call Circular". The Circular

provided a definition for on-call working, a rate of pay for on-call working, and provision for an 'On-Call Availability Allowance'. It superseded previous arrangements derived from Agenda for Change. The Circular reflects a collective agreement reached on 31 August 2012 between management and staff-side representatives which was binding on all staff subject to Agenda for Change. It varied their individual terms and conditions. The circular also contains a "Q&A" section which I treat as an aid to the construction of the contractual terms.

32. As for pay protection, in broad terms the circular provided that "mark-time" protection arrangements (derived from the "Chisholm Agreement") would apply to those who suffered financially as a result of the new arrangements. The claimant was not in receipt of any other form of pay protection unrelated to the circular when the circular was implemented. I will consider the provisions of the "On-Call Circular" (PCS(AFC) 2012/4) in more detail below as part of my reasoning and conclusions.

33. On 8 April 2014, the claimant was issued with a letter from Ian Reid (Director of Human Resources) and Donald Sime (Employee Director) setting out the level of "mark-time protection" which he was to receive under PCS(AFC) 2012/4. The Respondent has paid the claimant mark-time protection in accordance with that letter.

Applicable legal principles

Unlawful deductions

34. The sole statutory question for present purposes is that arising under section 13(3) of the Employment Rights Act 1996: whether the total amount of wages paid by the employer to the worker was less than the total amount of wages "properly payable" to him. No other aspects of the unlawful deductions provisions are in issue.

Contractual interpretation

35. The respondent's skeleton argument helpfully summarised the leading authorities on contractual interpretation. On behalf of the claimant Mr Bathgate took no issue with it as an accurate summary of the applicable law. Since it was agreed I will set out an even more condensed summary here.

36. The following principles can be derived from the well-known cases of ***Reardon Smith Line Limited v Yngvar Hanser-Tangen*** [1976] 1 WLR 989, HL, ***Investors Compensation Scheme Limited v West Bromwich Building Society*** [1998] 1 WLR 896, HL, ***BCCI v Ali*** [2001] UKHL 8, ***Chartbrook v Persimmon Homes*** [2009] UKHL 38, ***Rainy Sky SA v Kookmin Bank*** [2011] UKSC 50, SC and ***Arnold v Britton*** [2015] UKSC 36, SC. There is absolutely no doubt that these principles apply in Scotland: see for example ***Fife Council v Royal and Sun Alliance Insurance Plc*** [2017] CSOH 28 in which Lady Wolffe noted that the principles had been accepted and applied by the Inner House in many cases.

37. The essential task is to ascertain the meaning which the contractual document would convey to a reasonable person having all of the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract.

38. The question must be approached from an *objective* perspective, focussing on what would have been known to a reasonable person at the time the contract was entered into.

39. The process of interpretation involves examining the context in which words were used. The concept of 'natural and ordinary meaning' of words is not helpful where, on any view, the words have not been used in a natural and ordinary way. The Tribunal must seek to understand the words *in context*. The (admissible) surrounding circumstances should be examined, *whether or not at first sight the words appear ambiguous*, since in order to identify whether words have been used in a 'natural and ordinary way' it is first

necessary to understand the meaning of those words in context. The context includes absolutely anything which would have affected the way in which the language of the document would have been understood by a reasonable man.

40. However, the law excludes from that context evidence of the previous negotiations of the parties and their declarations of subjective intent. Such evidence will be inadmissible *for the purpose of drawing inferences about what the contract means*. However, it might be admissible for other purposes, for example to show that a fact which might be relevant as background was known to the parties.

41. There is otherwise no conceptual limit to what can be regarded as admissible background, as long as it is relevant.

42. The fact that one or both parties might actually have taken no particular interest in certain aspects of the factual background does not prevent them from forming part of the objective setting in which the contract is to be construed.

43. The meaning which a document would convey to a reasonable person is not the same thing as the meaning of its words. The *meaning of words* is a matter of dictionaries and grammars whereas the *meaning of a document* is what the parties using those words against the relevant background would reasonably have been understood to mean. The background may not merely enable the reasonable person to choose between possible meanings of *ambiguous* words but may even enable the reasonable person to conclude that the parties must, for whatever reason, have used the wrong words or syntax.

44. The interpretation of words in accordance with their ‘ordinary and natural’ meaning reflects the common sense proposition that we do not easily accept that people have made linguistic mistakes, particularly in formal documents. On the other hand, if the background would lead a reasonable person to

conclude that something must have gone wrong with the language, then the law does not require Tribunals to attribute to the parties an intention which they plainly could not have had.

45. If detailed semantic and syntactical analysis of words in a commercial contract would lead to a conclusion which flouted business common sense then it must yield to business common sense.

46. Words and phrases could have a customary meaning in a particular market which is different from their 'ordinary and natural' meaning, in which case evidence to that effect could support an argument that words in a contract should bear a similarly unconventional meaning. This is the "private dictionary" principle.

47. That said, the law of contract is designed to enforce promises with a high degree of predictability and the more that conventional meanings or syntax are allowed to be displaced by references drawn from background, the less predictable the outcome is likely to be.

48. Where the language used by the parties is capable of more than one meaning then the court is entitled to prefer the construction which is consistent with business common sense and to reject the other. It was not necessary to conclude that a particular construction would produce an absurd or irrational result before having regard to the commercial purpose of the agreement.

49. How should the interpretative principles above be balanced where they are in tension? ***Arnold v Britton*** [2015] UKSC 36, SC distilled six principles of general application and indicated how they were to be reconciled (the seventh principle related to service charges and is not relevant for present purposes).

a. The reliance in some cases on commercial common sense and the surrounding circumstances should not be invoked to undervalue the importance of the language of the provision to be construed. Save perhaps in a very unusual case, the answer to the question what the parties meant (seen through the eyes of a reasonable reader) was

most obviously gleaned from the language of the provision. Unlike commercial common sense and the surrounding circumstances, the parties have control over the language they use in a contract. Save in a very unusual case, the parties must have been focusing specifically on the issue covered by the provision when agreeing the wording of that provision.

b. The less clear the words, the more ready a court can properly be to depart from their natural meaning.

c. Commercial common sense must not be invoked retrospectively. The mere fact that a contractual arrangement interpreted according to its natural language had worked out badly or even disastrously for one of the parties was not a reason for departing from the natural language. Commercial common sense is only relevant to the extent of how matters would or could have been perceived by reasonable people in the position of the parties as at the date when the contract was made.

d. While commercial common sense is a very important factor to take into account when interpreting a contract, a court should be slow to reject the natural meaning of a provision as correct simply because it appeared to be a very imprudent term for one of the parties to have agreed, even ignoring the benefit of hindsight. The purpose of interpretation is to identify what the parties have agreed, not what the court thinks they should have agreed.

e. When interpreting a contractual provision, the court can only take into account facts or circumstances which existed when the contract was made and which were known or reasonably available to the parties.

f. In some cases, an event subsequently occurs which was plainly not intended or contemplated by the parties, judging from the language of their contract. In such a case, if it is clear what the parties would have intended, then the court would give effect to that intention.

Submissions

50. Both sides relied on written skeleton arguments, supplemented by oral

submissions. Given that the submissions are already largely summarised in writing, I will deal with the key points as part of my reasoning and conclusions. That should be sufficient for these reasons to comply with rule 62, the principles in ***Meek*** [1987] IRLR 250, CA and Article 6 ECHR.

Reasoning and conclusions

51. I will use sub-headings in italics to track the agreed issues.

What were the Claimant's relevant contractual terms and conditions from 2002 until the implementation in 2014 of NHS Circular PCS(AFC)2012/4 (the Circular)?

52. The claimant's individual terms and conditions were initially subject to Whitley Council terms, which in turn allowed for local agreements to be reached. The 2002 Agreement was one such local collective agreement. Neither side disputes that its terms were apt for incorporation into individual contracts and I find that they duly formed part of the claimant's terms and conditions. The details are already set out above at paragraphs 12-24.

53. Agenda for Change made no practical difference to the relevant issues in this case prior to the implementation of NHS Circular PCS(AFC) 2012/4. That is because the interim transitional arrangements expressly permitted the claimant to choose to retain terms derived from the 2002 Agreement rather than transfer onto Agenda for Change interim arrangements. The claimant chose to retain his existing terms, and Circulars PCS(AFC) 2008/6 and its addendum dated 12 January 2009 did not modify his terms and conditions in any relevant respect.

In particular:

a. *Was the Claimant working an on-call arrangement or a shift arrangement from midnight to 0900hrs?*

b. *Were the hours between midnight and 0900hrs part of the Claimant's standard working hours under the General Whitley Council and Agenda for Change?*

54. The first question has no real meaning unless the facts are measured against a contractual definition of on-call working. It serves no useful purpose to ask whether working time between 0000 and 0900 was better characterised as "on-call" or as "a shift" unless those terms are themselves defined. I will consider the relevant contractual definition below.

55. The answer to the second question is "yes", for the reasons already set out in paragraphs 12-24 above. First, the evidence of Senga Rowan supports the conclusion that 0000 to 0900 formed part of weekly working hours (being treated as 7 such hours). Second, there is a lack of evidence that the period of rest the following day was treated as counting towards working hours. If that rest period had been treated as working time, as opposed to just a gap in the roster and a period of rest, then that might have supported the argument that "on-call" periods did not also count towards the working week, since the total number of hours would otherwise be greatly exceeded. However, the weight of the evidence suggests that it was the "on-call" period, rather than the rest period, which counted towards the working week.

At the point of implementation of Circular PCS(AFC)2012/4 was the Claimant's work between midnight and 0900hrs on-call work as defined by paragraph 4 of the Circular?

a. *If it was, did the Respondent apply the terms of the Circular appropriately to the Claimant?*

b. If it was not, did the Respondent apply the terms of the Circular appropriately to the Claimant?

56. The respondent's primary argument was not really reflected in the list of issues, because Mr Reeve argued that the true question was not whether the definition of "on-call" working was met, but rather whether the implementation group had *decided* that it was met. He relied on Q11 in the Q&A which says that "*this will be determined in partnership by the local implementation group*". However, on an objective construction I regard that as a procedural provision, defining the process by which the definition of "on-call" would be applied to each group of affected workers, since it would otherwise be uncertain who would have responsibility for that aspect of implementation. It would require very clear words to persuade me that, as a matter of contract, a court or Tribunal simply had no role in determining whether or not a key contractual definition had been satisfied.

57. The definition of "on-call" for the purposes of the circular is contained in paragraph 4.1.

"This agreement will cover situations where staff are on-call when, as part of an established arrangement with their employer, they are available outside their normal working hours – either at the workplace, at home or elsewhere - to work as and when required."

58. In my judgment there are three important aspects to that test:

a. an established arrangement with the employer;
b. availability outside normal working hours;
c. to work as and when required.

59. The claimant certainly had an "established arrangement" in the form of the 2002 Agreement. The question is, "to do what?"

60. I find that on an objective construction, the phrase "as and when required" must mean something more than the normal fluctuations in workload, as might happen during the 0900 to 1700 working day. I find that the contracting parties must have intended the phrase to mean that when there was insufficient work to keep all radiographers busy staff could rest (other than at defined break times). That would not necessarily entail returning home or leaving site at all since paragraph 4.1 expressly envisages that on-call work might include on-call availability *at the workplace* as well as at home or elsewhere.

61. However, while I find that radiographers such as the claimant could and often did rest when their workload between 0000 and 0900 allowed it, I am not satisfied on the balance of probabilities that the "established arrangement" included express or implied agreement that they could do so. I find that the use of a bedroom was an unofficial practice and that it did not form part of the "established arrangement".

a. I heard no evidence that it was *expressly* agreed or consciously approved by management. The statements from the claimant and his supporting witnesses do not go so far as to suggest express management agreement. Any such agreement is conspicuously absent from the letter confirming the terms of the 2002 Agreement or the email dated 7 September 2009 from Senga Rowan describing the arrangement.

b. Nor is there a sufficient basis for a finding that there was an *implied* term that radiographers could use a bedroom or sleep at any point during 0000 and 0900, and I refer back to my findings of fact on this issue (paragraph 24 above).

c. No standby payments were made under or following the 2002 Agreement in respect of work between 0000 and 0900. They would ordinarily have been a feature of on-call work. The "on-call" payments were fixed in advance and bore no relation to the amount of work

actually done on any particular night.

d. I am therefore driven to the conclusion that the period of work between 0000 and 0900 was not accurately characterised as an obligation to work only "as and when required". It was simply a rostered period of work.

62. Further, for the reasons already set out above in my findings of fact, the period 0000 to 0900 was not "outside their normal working hours". It formed part of those working hours.

63. In summary, while the claimant certainly had an "established arrangement" the rest of the definition of "on-call" working was not satisfied, since:

a. the work took place during working hours; and also
b. it was not an arrangement to work "as and when required". It was simply rostered work.

64. On behalf of the claimant, Mr Bathgate's submission was that if the claimant failed to satisfy the definition of "on-call" in paragraph 4.1 of the circular then none of the other terms of that circular applied to him, such that his entitlement to pay protection derived from other sources.

65. I do not accept that submission.

a. The introductory paragraphs from Shirley Rogers, Deputy Director, Directorate for Health, Workforce and Performance, indicated that the agreement forming Appendix A to the circular resulted from "*a national review of on-call systems in place across the UK*" and that it was intended to "*harmonise on-call payments*". That introduction suggests strongly that it was intended to apply to staff working in on-call systems and receiving on-call payments, whether or not they met the definition of "on-call" in paragraph 4.1 which would be applied in future.

b. Under the sub-heading "*Scope*", paragraph 3.1 states that "*These arrangements apply to all staff covered by the Agenda for Change agreement…*", which is much broader than the definition of "on-call" under the heading "*Application*" in paragraph 4.1. The claimant plainly fell within paragraph 3.1. I find that paragraph 3.1 defines the scope of the agreement whereas paragraph 4.1 sets out the definition of "on-call" to be applied to staff falling within the scope of the agreement.

c. Further, the circular clearly and expressly provides for the treatment of those who failed to meet the definition of "on-call". The Q&A section in Annex B is part of the contemporaneous background which I take into account as an aid to construction. It is relevant and, viewed objectively, it shows how the document would have been understood by a reasonable observer at the time. Such an observer can also be taken to be aware of the general objective of harmonisation and the protracted implementation of Agenda for Change which lay behind the circular. Q15 asks "*What staff are covered by the "Chisholm Agreement" being applied to the on-call arrangements?*" This is otherwise known as the "marked-time" form of pay protection. The answer was that: "*Any staff who suffer loss of earnings either directly or indirectly as a consequence of the introduction of the new on-call payment system,* ***including those who might fall outwith the new definition****, are covered by this protection*" (emphasis added in bold). The claimant was just such a person. This provides the context in which paragraph 12 ("Protection") should be understood.

66. For those reasons I find that the collective agreement in Annex A did apply to the claimant and that Mr Bathgate's analysis would fail to give effect to the objective meaning of the contract. The terms of Annex A, interpreted with the aid of the introductory paragraphs and the Q&A document in Annex B, were incorporated into the claimant's contract of employment and became part of his contractual terms.

67. It follows that the respondent correctly applied the terms of the Circular to the claimant. His "on-call" arrangements failed to meet the definition in paragraph 4.1 and he was therefore entitled to "marked time" or "Chisholm Agreement" protection. See paragraph 12 of Annex A and Q15 of Annex B.

68. The claimant was not entitled to the more lucrative form of "no detriment" pay protection derived from the organisational change provisions of the "Workforce Change Policy and Procedure". Entitlement would depend on "*a structural or managerial change in the way services within the Board are organised or provided which affects the employment, pay and conditions of service, or roles and responsibilities of staff.*" While there was certainly a change in pay here, there was no "structural or managerial change in the way services" were organised or provided.

69. Since there was no independent entitlement to "no detriment" pay protection on account of organisational change, the applicable pay protection was on a mark-time basis in accordance with paragraph 12 of Annex A to the circular.

Conclusion

70. In summary then, my conclusions are that:

a. the claimant's working arrangements under the 2002 Agreement did not meet the definition of on-call working in paragraph 4.1 of Annex A to Circular PCS(AFC) 2012/4;

b. the claimant was entitled to "Chisholm Agreement" or "mark time" pay protection under the terms of the Circular and its Annexes, but not to the "no detriment" pay protection applicable to situations of "organisational change" under the Workforce Change Policy and Procedure.

71. My understanding is that those findings mean that the claimant has suffered no loss, and that he has been paid all that is properly due to him under the applicable contractual arrangements. On that basis the claim for unlawful

deductions from wages is not well-founded and it must therefore be dismissed.

72. If the understanding in the preceding paragraph is wrong then the parties should apply within 14 days and I will deal with remedy by way of reconsideration.

73. The remaining matters in the list of issues are as follows.

Did the Respondent alter the Claimant's system of work on implementation of the Circular?

If so, did the change to the Claimant's system of work meet the definition of organisational change as set out in the Respondent's Workforce Change Policy and Procedure?

Has the Claimant shown a legal entitlement to the sums that he is claiming by way of unlawful deduction from wages?

Is the remedy restricted back to 10 March 2018 under the Deduction from Wages (Limitation) Regulations 2014?

74. The answers to the remaining questions in the list of issues are therefore:

a. In a sense, yes. There was no structural or managerial change, but there was a change in pay.
b. No.
c. No.
d. Yes, had there been any due.

Employment Judge: Mark Whitcombe
Date of Judgment: 22nd February 2021
Entered in Register: 27th February 2021
And copied to parties